

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of:	)	
Revision of Procedures Governing	)	MB Docket No. 05-210
Amendments To FM Table of	)	RM - 10960
Allotments and Changes	)	
Of Community of License in the Radio	)	
Broadcast Services	)	

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**COMMENTS OF AMERICAN MEDIA SERVICES, LLC, RADIO ONE, INC.,  
MATTOX BROADCASTING, INC., KLEIN BROADCAST ENGINEERING, LLC,  
ON-AIR FAMILY, LLC, HUNT BROADCASTING, INC. , MEDIA SERVICES  
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October 3, 2005

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## **Executive Summary**

The Joint Commenters agree that procedures for channel allotments must be brought up to date. The NPRM should lead to long-needed reforms including the use of minor change applications to relocate existing stations and the simultaneous filing of a fully paid FCC Form 301 with new allocation proposals to dissuade insincere proponents and speculators. The NPRM also rightly confronts the problems posed by a community's right to keep its last local station in the face of demographic and geographic changes – despite the availability of other reception services. Overall, the NPRM takes important steps in light of 21<sup>st</sup> Century realities. These include the unchanged reality that the long-used FM Table of Allotments continues to ensure thorough engineering and review, as well as fundamental fairness, in the allocations process.

But, a significant proposal, if enacted, would undermine the core national policy, codified in Section 307(b) of the Communications Act, that the Commission must act to ensure “fair, efficient and equitable distribution of radio services.” This would occur if the Commission adopts a rule to “limit the number of channel changes” in any one proceeding. The Commission says the measure will unwind tangled “Gordian knots of interconnected proposals” that “demand enormous amounts of staff time.” The proposal is, thus, based on the Commission's desire for greater administrative convenience. But, elevating administrative convenience to a paramount virtue would come at a significant price.

Rather than truly untangling any Gordian knot, the limitations proposed would instead create a hangman's noose of status quo spectrum regulation. If enacted, this proposal would choke potential innovation out of the allocations system by creating a presumption against anything too dramatic or too visionary – simply because it involves changes to too many stations. It creates this presumption against those few large scale proposals received each year by the Commission, precisely when such innovation can help the Commission fairly, efficiently and equitably distribute radio services amidst unprecedented changes in communications needs.

The handful of large-scale station relocation proposals each year arise from efforts to allow more stations to share the nation's jam-packed broadcast spectrum. Less complex proposals, while valuable, will often not free up spectrum that is otherwise inefficiently locked away due to allocations made under different historic conditions. In some places, no additional stations can be added without extensive re-engineering because harmful interference will occur.

The Administrative Procedure Act does instruct agencies to establish internal procedural rules. But, an agency must do so in a way that comports with its specific enabling statute. As the FCC may not ignore specific statutory mandates, administrative convenience may not trump the need for fair, efficient and equitable distribution of radio service under Section 307(b).

The Commission suggests that this proposed rule could be set aside through waivers, as needed. But, precedent demonstrates that the Commission simply does not deviate. It has not waived the current "Columbus, Nebraska Policy" for involuntary channel changes, which the NPRM characterizes as a model for the proposed new limitations.

If the Commission is unable, due to budgetary constraints, to provide adequate review, it must create a mechanism to fill the breach. Rather than allowing budgetary constraints to choke off innovation, the Commission should instead allow the private sector to provide the resources necessary to overcome budgetary restraints. This type of public-private partnership will allow for better distribution of radio services to meet 21<sup>st</sup> Century needs than will the proposed bright-line rule that arbitrarily limits the size and scope of proposals.

The nation's communications systems are evolving at an unprecedented pace. The Commission should not codify procedures that hinder innovation at the exact moment the nation's communications needs are changing and growing exponentially. The proposed cap on channel changes is a recipe for freezing out innovative broadcast spectrum management solutions – precisely when the nation needs them the most.

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Introduction

The Joint Commenters endorse the notion underlying this proceeding that the FCC's system for allotting FM channels and awarding stations to communities should be brought up to

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<sup>1</sup> Revision of Procedures Governing Amendments To FM Table of Allotments and Changes Of Community of License in the Radio Broadcast Services, *Notice of Proposed Rule Making*, MB Docket No. 05-210, RM-10960, FCC 05-120 (Jun. 14, 2005).

date. Many of the Commission's proposals will clearly prove positive. But, the proposal to "limit the number of channel changes that may be proposed in one proceeding"<sup>2</sup> would, among other things, significantly conflict with significant statutory mandates and, ultimately, freeze out innovative spectrum management solutions – precisely when the nation needs them the most.

### Discussion

(1) The FCC is correct insofar as it recognizes that its system for allotting FM channels and communities of license is out of date. It is true that the system needs streamlining in order to bring about needed changes more quickly and efficiently. It is also true that resource constraints at the Commission exacerbate delays. In this light, the NPRM should lead to several long-needed reforms.

The proposed use of minor change applications to change the communities of license of existing stations will streamline the Commission's processes. Similarly, the FCC's proposal to require the simultaneous filing of a fully paid FCC Form 301 will provide a mechanism to dissuade insincere proponents and counter-proponents from clogging the Commission's dockets. The cost-benefit analysis will shift to favor those who actually want to build a station. At the same time, the additional up-front costs will make the process less attractive to speculators who have long treated the allocations process as a means to achieve potential lotto-style riches.

Finally, by seeking comment on possible changes to rules that create expectancy rights in a community's last local station, regardless of demographic and geographic changes, the Commission is taking an important step toward ensuring that distribution of radio services is fair, efficient and equitable in light of 21<sup>st</sup> Century realities rather than those of yesteryear. As will be discussed in these comments, the key to creating such a regulatory environment will be to maximize the potential for engineering solutions to expand the number of stations using the finite

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<sup>2</sup> NPRM at ¶¶ 35-37.

spectrum available for broadcasting. In this way, the Commission need not be bound by the historic view that increased service in the nation's rapidly growing urban, suburban and nearby areas must come at the expense of rural communities from which stations will be relocated. By embracing the innovations offered through the removal of impediments to spectrum re-engineering, it will be possible to increase and improve service in more populated and urbanized areas while continuing to provide service in less populated rural areas.

The Commission should not, however, upend the time-proven and procedurally sound use of a rule-based FM Table Allotments. This approach has allowed all interested parties a fair opportunity to provide evidence regarding whether a proposed change is in the public interest. Should the Commission eliminate the rule-based Table of Allotments, the chance for errors that hinder more effective use of spectrum will increase. Parties will be required to monitor each and every application, rather than participate in broader, well-publicized table of allotment change proceedings. The table of allotments provides transparency – which is important for effective management of the crowded FM band. Moreover, through the broader participation fostered by such table of allotments proceedings, there is less need for FCC engineering staff intervention as the parties to the proceeding will provide the expertise needed, freeing FCC staff for the simpler task of review and verification. Thus, maintenance of the table of allotments will support the public interest both in fair, efficient and equitable distribution of radio service and in diminishing administrative burdens that slow FCC processes.

Additionally, one of the Commission's most significant proposals in the NPRM – to “limit the number of channel changes that may be proposed in one proceeding”<sup>3</sup> – will hinder this much-needed re-engineering process. As a result, this proposal is ill-conceived.

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<sup>3</sup>

*Id.*

The proposal is ill-conceived because: (1) it will frustrate the “fair, efficient and equitable distribution of radio services,”<sup>4</sup> required by the Communications Act, making administrative convenience a paramount concern, despite the statutory imperative to the contrary; (2) it will needlessly stifle innovation in broadcast spectrum regulation and, thereby, impede the opening of new service where it is needed as a result of demographic and geographic changes; (3) its imposition of a maximum number of station changes would be arbitrary and capricious, and; (4) it fails to take advantage of alternative opportunities to supplement Commission resources so that administrative convenience need not be the enemy of improved radio service to more Americans.

Instead, the Commission should adopt alternative resolution methods to better regulate and manage broadcast spectrum in a way that reflects today’s actual communications needs, as well as those of tomorrow, and beyond.

(2) Section 307(b) of the Communications Act is Paramount; It Must Not Be Undermined. The Commission specifically proposes to hinder efficient and equitable distribution of radio services by putting forth – on its own motion – a proposed rule that would “limit the number of channel changes that may be proposed in one proceeding.”<sup>5</sup> This rule is offered as a means to promote administrative efficiency in the face of ever-limited FCC resources. The Commission says the measure will improve administrative convenience by unwinding tangled “Gordian knots of interconnected proposals”<sup>6</sup> that “demand enormous amounts of staff time.”<sup>7</sup>

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<sup>4</sup> See 47 U.S.C. § 307(b).

<sup>5</sup> NPRM at ¶¶ 35-37.

<sup>6</sup> *Id.* at ¶ 35.

<sup>7</sup> *Id.*



But, while it is true that the Administrative Procedure Act does instruct administrative agencies to establish internal administrative rules<sup>8</sup> to govern internal procedures, an agency must do so in a way that comports with its agency-specific enabling statute.<sup>9</sup> Therefore, administrative convenience must not trump imperatives expressly set forth in the Communications Act.

But, if enacted, the proposed limitation on the number of station changes, in any single allotment proposal or related group of proposals and counter-proposals, would effectively make the Commission's administrative convenience paramount to the directive of Section 307(b) of the Communications Act – that is, Congress's direct instruction that the Commission must act to ensure “fair, efficient and equitable distribution of radio services.”<sup>10</sup>

The Commission would violate this statutory mandate if it adopts the proposed presumption against anything too dramatic or too visionary when such a plan would involve changes to too many stations. The proposed station change cap would create a bright line bar against those very few large scale proposals received each year by the Commission, precisely when such innovation can help provide for fairer, more efficient and more equitable distribution of radio services in the face of unprecedented and rapid changes in the nation's demographic, geographic and communications realities.

Rather than truly untangling any Gordian knot, the limitations proposed would instead create a hangman's noose of status quo spectrum regulation. If enacted, this proposal would choke potential innovation out of broadcast spectrum regulation. The presumption would apply

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<sup>8</sup> See 5 U.S.C. § 552(a)(1)

<sup>9</sup> See *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986) (holding that agency action must not undermine the plain language of the agency's governing statute.)

<sup>10</sup> See 47 U.S.C. § 307(b).

even if such innovation would help the Commission meet the mandate of Section 307(b) as informed by current, rather than historic conditions.

The Commission appears to anticipate such concerns when it acknowledges that application of this proposed rule could be set aside through a waiver.<sup>11</sup> But, precedent demonstrates that the Commission never grants waivers when a party proposes to exceed established benchmarks limiting the number of station changes in an allocations proceeding. This has been true under the current “Columbus, Nebraska Policy” for involuntary channel changes,<sup>12</sup> which the commission offers as a model for the current proposal. Analysis of this so-called model, demonstrates that that the Commission will simply resist any deviation from the stated rule.<sup>13</sup>

While it is true that the Commission recognizes its legal obligations to give a reason, and usually meets its court-mandated obligation to give waiver requests a “hard look,”<sup>14</sup> it will always – or nearly always – deny waivers in this area of regulation. The Commission has given no indication that it will respond any differently should it adopt the NPRM proposal to limit station changes.

Moreover, even if the record showed that waivers were possible rather than merely theoretical, reliance on waivers is simply not an effective method of fostering innovation. As

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<sup>11</sup> NPRM at ¶ 37.

<sup>12</sup> “[A]bsent special factors involving significant public interest benefits, or an assurance of agreement among affected stations to the proposal in advance of filing the petition, the staff has been instructed not to entertain proposals for changes . . . which involve more than two other substitutions of channels occupied by existing FM or TV stations.” See NPRM at ¶ 36 (citing *Columbus, Nebraska*, 59 R.R.2d 1184 (1986)).

<sup>13</sup> Among the FCC’s published cases, no notable examples exist in which the Commission granted waivers to the Columbus, Nebraska policy.

<sup>14</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)

there always exists a presumption that a rule is to be followed (otherwise, why bother having a rule?), and the underlying purpose of the rule proposed here is administrative convenience, the purpose of the rule will be met by making things simpler to manage at the Commission. Such a regime would exclude even the most innovative proposal because review will require the extensive use of limited Commission resources.

Moreover, the NPRM acknowledges that proposals to open up more spectrum, when they involve more than five stations, might end up being subdivided into smaller proposals “enabling the staff more efficiently to process them.”<sup>15</sup> Although this invitation to creative packaging appears to balance the need for administrative convenience with the mandates of Section 307(b), it does not, in fact, do so. It is actually another means to bolster administrative convenience at the expense of fair, efficient and equitable distribution of radio services. This would occur because longstanding Commission policy bars contingent applications in allocations proceedings.<sup>16</sup> The Commission could only entertain proposals that BOTH involve fewer than five station relocations AND are not contingent upon the outcome of any other proposal or application. As the ability to unlock spectrum for more efficient use may require more than five inter-related station moves, and breaking up the proposals will perforce create impermissible contingencies, the submission of smaller, inter-related proposals and applications provides no solution. These smaller bits would still choke out innovation and, thereby, cause harm to the public interest in fair, efficient and equitable distribution of broadcast services.

All tolled, even if the proposal did not undermine Section 307(b) of the Communications Act (which it does), it would be bad policy because it would harm innovation and improved service that can keep free over-the-air radio service relevant in the face of immense

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<sup>15</sup> NPRM at ¶ 37.

<sup>16</sup> See *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (MMB 1996).

demographic, technological and cultural change. When viewed in context with the mandates of Section 307(b), it is clear that the proposed limitation on station changes should be summarily dropped.

(3) Demographic and Geographic Changes Create New Needs for Service; The Proposed Limitation on Station Changes Will Hinder Such Innovation. The rural-urban population ratio is shifting in the United States. Large urbanized areas are growing much faster. The top 30 Arbitron Survey areas added over twelve million additional people from 1990 to 2000, while, in those same states, population growth was only one-third as great in areas outside of Arbitron Metros.<sup>17</sup> The movement toward more rapid increases in urbanized populations has even led some rural areas to offer cost-free land to lure new residents to regions that have become increasingly depopulated.<sup>18</sup>

The broadest possible flexibility will be required to create much needed new broadcast service in a way that minimizes adverse impact on existing service areas. Unless the Commission creates such flexibility, the distribution of radio services will remain mired in the past.

While the ratio of radio stations to population can be a determining factor in auction proceedings when the Commission requires Section 307(b) showings,<sup>19</sup> such analysis would bear

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<sup>17</sup> Source: U.S. Census 1990 and 2000 Block Groups. Block Groups for 1990 were redistricted from 1990 Census Blocks into 2000 Block Group boundaries for uniform comparison.

<sup>18</sup> See, e.g., Daniel Kadlec, *The Land of the Free*, Time, July 11, 2005, at 42 (attached hereto as Exh. 1.)

<sup>19</sup> See, e.g. *Robert E. Combs*, 19 FCC Rcd 13421 (FCC 2004) at ¶ 7 (awarding new station to Las Vegas, Nevada, rather than Boise, Idaho, under the fourth of the four analytical criteria applied for such review); see also *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (FCC 1991) at ¶ 15 (holding that “[a] petitioner will be allowed to make a showing that discounts the raw population totals in proportion to the differences in the number of services available in the proposed service areas.”)

little weight if a community is to lose its only local service to an area that already has some service. This is true even if the population ratio would indicate that a densely urbanized area is underserved relative to a rural town. The only way to assure fulfillment of this community service mandate is through creative, innovative engineering that would allow the continuation of local service in rural communities and, at the same time, allow an expansion of service in places experiencing dramatic population growth. The only way to create more stations to meet current and future demographic needs, without increasing harmful interference, is to re-engineer existing allotments to more efficiently apportion the available spectrum.

Such a development would require eliminating the presumption that migration of a station automatically diminishes service in the community losing its station.<sup>20</sup> This makes sense, given today's overcrowded airwaves because, when a station moves, it leaves behind vacant spectrum. Through creative engineering, this spectrum can be reformatted for new service.

With the maturing of the Commission's auction system, this principal can be taken several steps further. Any spectrum unlocked through re-engineering should be put up for auction at the first opportunity. In so doing, the Commission could actually increase the number of broadcast services available in both rural and more populated areas. As potential licensees have shown significant interest in rural stations in the handful of broadcast auction proceedings that have been opened to date, it is clear that if you open a channel, someone will want to build a station on it. By allowing re-engineering efforts to move existing stations where they are most needed today and, at the same time, unlocking spectrum that would otherwise be unavailable, the Commission has an unprecedented opportunity to eliminate the historic conflict between rural and urban allocations.

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<sup>20</sup> See, *Community of License*, 5 FCC Rcd 7094 (FCC 1990) at ¶ 19 (stating "[t]he public has a legitimate expectation that existing service will continue . . . .")

As demonstrated, more complex proposals often create or improve services in rural areas as a corollary benefit to broadcaster efforts to reach more urbanized areas. A limit, such as the one proposed, would surely frustrate this goal. Commercial interests will simply follow the money. If the Commission will not entertain proposals that include more than five station changes, commercial interests would focus only on the most lucrative changes possible under the limited circumstances, or simply leave things as they are. But if the Commission does not arbitrarily cut off the size of re-engineering proposals, commercial interests will have incentives to create more stations – everywhere – as the incremental increase in potential profits will favor the creation of more rather than fewer stations.

The net result of such a policy would be to hinder improved diversity in all its forms, including the number and kind of voices. Consolidation in broadcast ownership would continue, as there would be fewer new opportunities for radio station ownership. In sum, new entrants will be stymied, while areas of increasing population that need new broadcast service will become even more underserved. All this, in the interests of administrative convenience.

(4) The Limitation Proposed on the Number of Station Changes in a Single Engineering Solution Would Be Arbitrary and Capricious. The Commission has presented no empirical evidence that it will better meet its Section 307(b) obligations by imposing a bright line rule against proposals to relocate five stations or more. It may be true that the less complex the proposal, the easier it is for FCC staff to process it. But, as noted, the Commission's interest in the administrative convenience of easier proceedings and lighter workload can not take precedence over the statutory requirement that it manage and regulate spectrum to create fair, efficient and equitable distribution of radio services.

As noted, very few proposals in any given year involve more than five station changes. Those few that do exceed that number represent an interlocked chain of voluntary relocations

based on sound, scientifically-based engineering.<sup>21</sup> Given the crowded state of the nation's broadcast bands, such proposals unlock otherwise unavailable spectrum by, at the same time, maximizing the number of stations and mitigating problematic interference.

As the core issue here must not be administrative convenience, given the statutory commands imposed by Section 307(b), the Commission must provide hard evidence before imposing the limitations proposed or any like them.<sup>22</sup> The Commission has not shown, nor can it show, that it should create a presumption against large scale engineering proposals able to increase the number of stations using increasingly scarce spectrum. Indeed, it has not even attempted to explain why it chose to put forth a limit of five station relocations per allocations proposal.<sup>23</sup> It makes no distinction between channel changes proposed for existing stations and proposals to create new stations – even though each has its own characteristics.

In the absence of evidence to support its chosen level of limitation and to demonstrate the limitation proposed comports with the mandates of, and further the goals of, Section 307(b), the Commission may not impose them, as its actions would be arbitrary and capricious, as well as contrary to law.

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<sup>21</sup> Indeed, more complex proposals involving more stations and station owners are more likely to be technically accurate because the several participating stations each obtain independent legal and engineering verification of both the validity of the proposal and the effects the proposal will have. This necessarily entails multiple layers of checking, rechecking and discussion among parties before a proposal is tendered for FCC consideration.

<sup>22</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983) (holding that an agency must provide a reasoned explanation that does not run “counter to the evidence” before it.)

<sup>23</sup> Unless the Commission provides an adequate basis for imposing such a rule, selection of any particular numeric cutoff would be arbitrary and capricious. See *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (stating that the Commission must provide “an adequate basis for believing the Rule would in fact further” a legitimate goal.)

(5) The Commission Should, Instead, Create Public-Private Partnerships to Supplement Internal Commission Review and, at the same time, Improve the Potential for Spectrum Management Innovation. Administrative efficiency need not be the enemy of innovation and full adherence to the mandates of Section 307(b). Rather than allowing budgetary constraints to choke off innovation, the Commission should instead allow the private sector to provide the resources needed. Interested parties should continue to provide the necessary engineering – both for and against a proposal – as they do now. However, the Commission should consider the additional use of party-funded alternative resolution methods instead of imposing a bright-line bar on more complex station-change proposals.

As one of the Joint Commenters, American Media Services, previously proposed,<sup>24</sup> the Commission should require parties to a contested allotment proceeding to submit to binding arbitration or similar decision-making if the proceeding remains pending for more than two years after the deadline for filing reply comments has passed. In this way, when the Commission's dockets are so full as to preclude timely staff review of more complex station change proceedings, alternative resolution proceedings could be commenced by any party to the proceeding willing to pay the full cost. *Bona fide* adjudicators, assisted by expert witnesses, would provide the equivalent of FCC-staff level review.

In addition, when processing delays indicate that FCC resources are overtaxed, the Commission should allow interested parties to underwrite voluntary quasi-administrative review

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<sup>24</sup> *Comments of American Media Services, LLC*, filed May 24, 2004, in response to the petition for rulemaking submitted by First Broadcasting Investment Partners, LLC in an earlier phase of this proceeding.



by FCC-approved outside arbiters. These arbiters, including legal and engineering experts uninvolved with the parties, can provide case review and then submit their findings to Commission staff for final approval.

The adoption of such privately funded alternative resolution mechanisms would help clear the processing backlogs while still unlocking valuable spectrum through innovative engineering.

To protect the parties' due process rights under a regime in which such private resolution would replace action by the FCC Audio Division, parties may still appeal to the full Commission or to a court of competent jurisdiction. As very few decisions are reversed on reconsideration, review or appeal, any party to the arbitration that seeks reversal and does not prevail should assume full financial responsibility for the alternative dispute resolution process. This additional provision will create a disincentive to needless, ongoing litigation so that alternative resolution will serve its designated purposes – that is, streamlining of processing in the face of limited Commission resources and limiting procedural and litigious gamesmanship that prevents improvements in service to the public. It will not dissuade review requests or appeals based on real grievances, as none of these additional costs apply when a party prevails, nor would it apply to anyone not involved in the initial proceeding.

Overall, the mandatory use of alternative resolution mechanisms, as proposed here, is in keeping with FCC's policy. *See Use of Alternative Dispute Resolution Procedures in Commission Proceedings*, 6 FCC Rcd 5669 (1991). Such partnership between the FCC and private parties wishing to assist the Commission in keeping its processing queues manageable should have a dual benefit. Through such a process, the FCC need no longer make the false choice between administrative convenience and improved broadcast spectrum management and regulation. It can have both.

This solution recognizes that government agencies, such as the FCC, face unprecedented resource constraints despite increased demands. But such constraints do not mean that an agency's reach should be held back to the detriment of its mission. The kind of public-private partnership described here provides the release mechanism necessary to maintain administrative efficiency without hindering the expansion and improvement of service to the public. This stands in stark contrast to the myriad public interest and statutory problems that would be created by adoption of a bright line limit on station change proposals.

### Conclusion

The FCC should adopt its proposal to require minor change applications for the relocation of existing stations and the simultaneous filing of a fully paid FCC Form 301 with any new allocation proposal. The FCC also must officially recognize that a shrinking community should not be presumed to be entitled to keep its last radio station – especially when residents have access to other reception services and other, growing communities have increased need for augmented service. Instead, by encouraging innovative re-engineering solutions, the Commission can unlock additional spectrum that can augment the number of broadcast channels available in both rural and more urbanized areas.

This win-win outcome requires that the FCC not adopt a bright-line limit on station changes in individual allotment proceedings, as proposed in the NPRM. It can better meet both its Section 307(b) mandates and other policy goals by instead adopting a public-private partnership approach to help clear processing backlogs. If the Commission adopts the proposed limitation on station relocation, it would make administrative convenience paramount over all other considerations. Such an outcome would both violate codified requirements and hinder the

kind of innovation needed to meet the changing demands for broadcast service in this 21<sup>st</sup>  
Century.

Respectfully submitted,

/s/

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October 3, 2005

## EXHIBIT 1

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*Time Magazine, July 11, 2005*

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July 11, 2005

**SECTION:** U.S. EDITION; SOCIETY; Pg. 42

**LENGTH:** 2140 words

**HEADLINE: Land of the Free;**

DESPITE THE REAL ESTATE BOOM, TOWNS ACROSS AMERICA'S HEARTLAND ARE GIVING ACREAGE AWAY. THE ONLY CATCH: YOU HAVE TO LIVE THERE

**BYLINE:** Daniel **Kadlec**, Sturmon Dale/New Richland; Pat Dawson/Chugwater; Rita Healy/Denver; Chris Maag/Whiting; Marguerite Michaels/Chicago; Eric Roston/Washington

**BODY:**

The last thing that goes is the grain elevator. Shortly before that, the post office. Preceding those, more or less in order, go the hardware store, lumberyard, gas station, grocery, pharmacy, bank and then, most dishearteningly, the schools. Those precious schools. After the kids are gone, it's just a matter of time before Main Street--and what remains of the once cheery little houses rimming it--gets boarded up for good.

Abandoned homes? Usable yet worthless real estate? It sounds crazy at a time when house prices in most parts of the country are soaring and the Internet has allowed millions to set up virtual offices and Web-based businesses anywhere they like. But for vast stretches of rural America, this is cold reality. The kids moved away for college or work and never came back, and now the World War II generation that stabilizes so many small towns is fast reaching the limits of mortality. As town elders die, even their money flees, inherited by offspring who long ago headed for the city--quicken the community's descent into dust. Yes, back home in Kansas they're minting ghost towns by the dozen.

But here's where things get wild. Hoping to reverse the decline, enterprising small towns across the Great Plains have begun offering land at little or no cost to anyone who will build a house and move in. The programs have taken wing in the Kansas towns of Marquette, Ellsworth and Minneapolis. "So far, I like what I see," says Jim Wymore, 40, as he is shown around Ellsworth on a gusty May afternoon. He's in town with his brother Shawn, 39, to check out the land deal. Both are from Chicago, and would be prize catches for any population-challenged community. They have five kids between them--which would bring the school district thousands of dollars in state aid--and jobs that keep them on the road, letting them live anywhere. They're looking for a place where they can get more for their money and raise their kids in a wholesome environment. "My daughter is growing up. She's in middle school," says Jim. "She's getting a little too ghetto, a little too urban. We want to be someplace with family values."

This scene is being replayed often throughout the Plains as a fast-growing band of land-granting imitators has taken root from La Villa, Texas, to Chugwater, Wyo., to New Richland, Minn. Dozens of towns have some version of a land giveaway, and dozens more are considering it. "The giveaways worked once, after the Civil War," says David Darling, an

expert in rural affairs at Kansas State University. "They have potential to work again."

This modern-day Homestead Act is a pale version of the one authorized by Abraham Lincoln in 1862, when settlers were given 160-acre tracts to encourage building out the frontier with farms and ranches. Today there is no central authority; the programs are initiated and run locally. Yet Washington has taken note. In March, Republican Senator Chuck Hagel of Nebraska and Democratic Senator Byron Dorgan of North Dakota reintroduced a bill that would forgive college debts, grant tax credits for a home purchase and fund small-business start-ups in counties that have lost at least 10% of their residents over the past 20 years. In Hagel's home state, 56 of 93 counties qualify.

It's in Kansas, though, that land giveaways are sprouting faster than wheat. The state has at least 11 locally run programs and is the most organized, with a website ([kansasfreeland.com](http://kansasfreeland.com)) that spells out details. Others are playing catch-up. In Whiting, Iowa, ground has been set aside while a decision is awaited about whether to charge people who take land for utilities. "There will be new houses on that land no matter what," promises Mayor Nancy Brenden. In Chugwater--aptly named, considering its place on the long, dry Oregon Trail traveled by early settlers--the first taker has just signed up. "We have all this new energy in town," says Mayor Krista West. "People are excited."

Be clear about this: no one is giving away choice property. The typical tract runs one-third of an acre in a new subdivision in which streets and utility lines have been laid. The parcels range in value from \$ 2,000 to \$ 20,000, depending on the town. But it will still cost \$ 80,000 to \$ 130,000 to build. Some folks come for the free land but see those numbers and decide instead to buy an existing home, which typically goes for considerably less. Towns aren't cutting any sweetheart deals for doctors or lawyers or other professionals needed in a thriving community. "One guy told us he wanted to build a bed and breakfast, so we were trying to figure out how to give him a bigger lot," says Steve Piper, mayor of Marquette and owner of its only grocery store. "After all our work, he never followed up. Now we just treat everybody the same."

By attracting new blood, these towns hope to avoid the fate of hundreds of hamlets across the Plains that have passed the point of no return--even if they don't know it. Kansas State's Darling says that once a town is down to its post office and silos, the decay is fatal. He estimates that 20% of Kansas' 627 incorporated communities are on the slippery slope to extinction.

Consider Paradise, Kans., which is just about lost. "We buried 12 here last year," says Garnett Angel, whose husband of 60 years, John, was one of the latest. That's a major hit in a tiny town, where the eroding school building hasn't been used in more than 10 years and a forest of mature trees sprouts within four walls of what used to be a bank on the main strip. Paradise was never big. But it bustled. Now its storefronts are shuttered, and the only action other than the, yes, tumbleweeds that roll through town is at the grain elevator, where the occasional farmer weighs and deposits wheat. Lucille Shearer, 58, who went to school here, works alone in the post office. Ask her how many folks live in Paradise, and she starts counting from a two-page phone book. "These days, about 50," she replies.

In Gem, Kans., where the three-story, hollowed-out brick Public School 21 looms over rows of abandoned homes, about all that's left functioning in the business district is, again, a grain elevator and a severely weathered tiny wooden post office with the ever present wind whipping an American flag out front. A rusting sign recalls better times: RESERVED FOR U.S. MAIL VEHICLES--as if there's any competition for a parking spot.

In Jennings, Kans., students from kindergarten through high school total about 30 in a single building. Next year only the elementary grades will remain; Grade 6 and up will be bused some 30 miles to Oberlin or Hoxie. It's expected that the younger kids will be bused away as

well. "It's beyond fighting," says Sharon Hickert, a loan officer at the Jennings Bank. The bank and a cafe are the last businesses on the strip. "We've seen a heckuva decline in the 12 years that I've been here."

A 140-mile stretch in Kansas on Route 4, from Geneseo to Shields, about 40 miles south of Interstate 70 is a veritable death valley. In town after town, schools have been boarded up, and the only preserved building is the American Legion post. These parts have so emptied that a turtle crossing the street has a decent shot at getting to the other side uninterrupted. Entire city blocks sell for \$ 100 at sheriff's auctions, only to be abandoned, tax delinquent and on the block again a few years later.

Rural America has been hemorrhaging population for decades, of course, with small towns trying--and failing--to reverse the outflow by wooing a big manufacturer with tax incentives. "That was the whole game--elephant hunting," says Anita Hoffhines, who heads economic development in Ellsworth. The new approach, known as "economic gardening," is to bring in people and let businesses follow. Not big businesses but shops and cafes that employ two or three people and that would slowly re-energize Main Street. It's a bit of a catch-22. With no jobs available, who will move there? And if no one moves there, how can you start a business? The land giveaways are meant to break this cycle by giving folks an economic reason to take a shot.

It isn't a new idea. Locally organized land giveaways have been tried sporadically for years, without much success. Typically, a town springs to action only when there is talk of shutting down the school. Yet by then the town is already on the slippery slope. In July 1981, Harley Kissner, then a 72-year-old bachelor who owned 640 acres near Antler, N.D., was alarmed by plans to shut down the school. He ran ads in three area newspapers offering ground to anyone who would build a house, move in with children and stay at least five years. The ads got national attention. "People started showing up overnight," says Janet Tennyson, 58. She and her husband run the only gas station in town. In a matter of weeks, Kissner found six takers and put them on generous 5-acre or 9-acre tracts. The new families brought in enough kids to keep the school open. But only for a while. Unable to keep jobs, the families left town a few years later; some had never built a house. The school closed in 1987. Kissner has since died.

Such failures offer lessons. Free land alone is not enough. Struggling towns need to attract folks who bring incomes with them or will commute to a larger city for work. And the towns are not above a little salesmanship. So Ellsworth, where Wild Bill Hickock once roamed and locals insist they know more about Wyatt Earp than his biographer does, promotes itself as "the wickedest cow town in the West." Prowers County, Colo., appeals to bird watchers with its 400 species. Atwood, Kans., tells hunters about its bountiful wild turkey, pheasant and deer. Six counties in northwestern North Dakota share a website (prairieopportunity.com) and play up the area's high-speed Internet access.

But for all the effort, the fate of these rural towns may have more to do with their proximity to a large city than anything they can do for themselves. Last October the Center for Rural Affairs in Lyons, Neb., published a study on land giveaways that concluded, "The most successful projects are those towns close to and within easy commuting distance of larger cities." That's where the jobs are, pure and simple.

The first real success was scored by Hendrum, Minn., less than 30 miles from Fargo, N.D. Since launching its land giveaway in 1994, Hendrum has added 18 homes--not exactly a boom but the first construction in at least a decade. "It has brought a lot to our town," says John Kolness, head of the local economic-development authority. Land values are rising, he says, and Main Street is picking up. The population decline has slowed significantly, and the town still offers free land to folks who will build on it.

Minneapolis, Kans., started a successful program in 1999. But it wasn't until Marquette enjoyed huge success with its program in 2003 that word spread, inspiring copycats. Marquette, within an hour's drive of Salina and Hutchinson, bought 50 acres of wheat field on the west side and began laying streets and utilities. All 82 lots have been taken; 23 new homes are finished or being built. The city's population, which had been falling, is now 650--up from 527 a year ago--and 45 kids have been added to the elementary school, says Mayor Piper. The giveaways "saved our school and rekindled a lot of pride in this town."

Jose Carillo, 35, is so convinced that land values are coming back in Marquette that after building his own house on a free lot, he took another and is building in hopes of selling quickly for a profit. "This is a great opportunity," he says. For the town too. --With reporting by Sarah Sturmon Dale/New Richland, Pat Dawson/Chugwater, Rita Healy/Denver, Chris Maag/Whiting, Marguerite Michaels/Chicago and Eric Roston/Washington

#### BOX STORY:

Let's Make a Deal!

#### CHUGWATER, WYO.

Free lots: Up to one-quarter acre. Rules: You must be in contract to begin building within six months and must move in within a year of starting construction--and agree to stay at least two years.

#### NEW RICHLAND, MINN.

Free lots: One-third of an acre; local lenders will also include the land's value as part of a down payment toward a new-construction loan. Rules: You must build within a year.

#### MARQUETTE, KANS.

Free lots: Up to one-third of an acre. Rules: You must begin construction within 120 days and agree to live in the house for at least a year.

#### ATWOOD, KANS.

Free lots: Up to one-third of an acre; extras include free membership at the golf and gun clubs, and movie passes. Rules: You need a preapproved house plan and loan and must build within a year.

**GRAPHIC:** COLOR PHOTO: Photographs for TIME by Steve Liss HOT PROSPECT, In from Chicago, Shawn Wymore and son Jacob survey a building site in Ellsworth, Kans.; COLOR PHOTO: Photographs for TIME by Steve Liss GHOSTLY, At midday the Kansas town of Bazine looks like many across the Great Plains: empty; TWO COLOR PHOTOS: Photographs for TIME by Steve Liss DOUBLE TAKE, Jose Carillo and his family built on free land in Marquette, Kans. He's building again, this time to sell; COLOR MAP: TIME MAP

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